

**Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.**

ATTORNEY FOR APPELLANT:

**WILLIAM F. THOMS, JR.**

Thoms & Thoms  
Indianapolis, Indiana

ATTORNEYS FOR APPELLEE:

**STEVE CARTER**

Attorney General of Indiana

**JOBY D. JERRELLS**

Deputy Attorney General

Indianapolis, Indiana

**IN THE  
COURT OF APPEALS OF INDIANA**

LAWRENCE SMITH,

Appellant-Defendant,

VS.

STATE OF INDIANA,

Appellee-Plaintiff.

)
)
)
)
)
)
)
)

No. 49A04-0702-CR-118

APPEAL FROM THE MARION SUPERIOR COURT

The Honorable Mark Stoner, Judge

Cause No. 49F09-0605-FD-98101

**October 31, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**MAY, Judge**

Lawrence Smith appeals his conviction of intimidation, a Class D felony.<sup>1</sup> He claims the evidence was insufficient to demonstrate his threat to a police officer occurred in response to the officer's lawful act. While the threatened officer was not one of the arresting officers, he was at the scene of Smith's arrest and, Smith's threat occurred in response to his arrest. Therefore, we find the evidence sufficient to support the conviction of intimidation.

### **FACTS AND PROCEDURAL HISTORY**

On May 30, 2006, at approximately 8:30 p.m., three Indianapolis police officers were eating at a Hardee's restaurant on East 10th Street. As they were eating, Officer Steven Hayth and Officer Tracy Dobbs noticed Smith stumbling as he walked along a sidewalk. Smith smiled at the officers, shaped his right hand into a gun, and pretended to shoot at the officers. After walking a short distance further, Smith turned around to the officers and again pretended to shoot them with his hand. Officer Aaron Schlesinger was unable to see Smith's actions from where he was sitting.

Officers Hayth and Dobbs finished eating and went outside to look for Smith. They found him stumbling through the back of the Hardee's parking lot. When they approached Smith, he smelled of alcohol and his eyes were glassy and bloodshot. They placed Smith under arrest for public intoxication and sat him on the ground to wait for the transport wagon.

---

<sup>1</sup> Ind. Code § 35-45-2-1. The offense is a Class D felony if the person threatened is a "law enforcement officer." Ind. Code § 35-45-2-1(b)(1)(B)(i).

When Officer Schlesinger finished eating, he approached the scene of the arrest, where Smith was sitting on the ground. When Smith saw Officer Schlesinger, Smith called him a “bitch” several times. (Tr. at 38.) Smith asked why he was being arrested, and when he learned the reason was public intoxication, he looked at Officer Schlesinger and said, “I’m going to do something about this . . . . When I get out of jail we’ll take care of this. We’ll handle this.” (*Id.*) The officers responded, “Yeah. Okay,” (*id.*); then Smith said to Officer Schlesinger, “I’m going to shoot you.” (*Id.*) Officer Schlesinger, who had heard similar threats in the past from arrestees, said, “Okay. That is nice. You don’t know where I live. Good luck . . . finding me.” (*Id.* at 80.) Smith then said, “I know you. I’ve seen you before in [Southport].” (*Id.* at 41.) At that time, Officer Schlesinger lived in Southport.

The State charged Smith with public intoxication and intimidation. A jury found him guilty of both charges.

### **DISCUSSION AND DECISION**

When reviewing a claim of insufficient evidence, we neither reweigh the evidence nor assess the credibility of the witnesses. *VanMatre v. State*, 714 N.E.2d 655, 657-58 (Ind. Ct. App. 1999). Rather, we consider only the evidence most favorable to the judgment, and all reasonable inferences therefrom, to determine whether a reasonable jury could have found the defendant guilty beyond a reasonable doubt. *Id.*

A person commits intimidation by (1) communicating a threat, (2) to another person, (3) with the intent “the other person be placed in fear of retaliation for a prior lawful act.” Ind. Code § 35-45-2-1(a). For the threat to be in retaliation for a prior

lawful act, “the State must establish that the legal act occurred prior to the threat and that the defendant intended to place the victim in fear of retaliation for that act.” *Casey v. State*, 676 N.E.2d 1069, 1072 (Ind. Ct. App. 1997).

The State alleged Officer Schlesinger’s lawful act was Smith’s arrest. (Appellant’s App. at 18) (“ . . . fear of retaliation for a prior lawful act, to wit: arresting Lawrence Smith”). Smith argues his conviction is improper because Officer Schlesinger was not one of the arresting officers. Officer Dobbs stopped Smith, and Officer Hayth placed him under arrest. Because Officer Schlesinger did not place him under arrest, Smith argues, there was no valid “prior lawful act” alleged. *See Casey*, 676 N.E.2d at 1072 (where the State’s charging information failed to allege any prior lawful act by the victim and the defendant’s threats did not indicate a prior lawful act, defendant’s conviction must be overturned).

We decline Smith’s invitation to overturn his conviction because the fully-uniformed officer at the scene of his arrest he threatened to shoot was technically not the “arresting officer.” Smith’s threat came in response to his arrest, and Officer Schlesinger was one of three officers at the scene of that arrest.<sup>2</sup> This evidence was sufficient. *See Graham v. State*, 713 N.E.2d 309, 312 (Ind. Ct. App. 1999) (distinguishing *Casey*, even though threat did not explain victim’s prior lawful act, because “the record supports the State’s contention that Graham threatened to retaliate . . . for [victim’s] prior and

---

<sup>2</sup> Because the State alleged and proved the officer’s involvement in a prior lawful act, the facts in this case are distinguishable from *Casey*, 676 N.E.2d at 1073. In addition, because Smith’s arrest came before he threatened Officer Schlesinger, we can distinguish *VanMatre*, where the State alleged the officer’s prior lawful act was “preparing to arrest” the defendant, but such arrest did not, in fact, happen until *after* the defendant threatened the officer. *VanMatre*, 714 N.E.2d at 658.

continuing legal act of participating as a witness against” the defendant), *trans. denied*  
726 N.E.2d 299 (Ind. 1999).

Affirmed.

CRONE, J., and DARDEN, J., concur.